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SUPREME COURT**

**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NOS.: 2015-SC-000194-WC AND 2015-SC-000208-WC**

FAMILY DOLLAR

**APPELLANT/
CROSS-APPELLEE**

**ON APPEAL FROM COURT OF APPEALS NO. 2014-CA-001053-WC
V. WORKERS COMPENSATION BOARD NO. : 2006-01247**

**MAMIE BAYTOS,
WIDOW OF STEPHEN BAYTOS, DECEASED**

**APPELLEE/
CROSS-APPELLANT**

AND

**HON. RICHARD M. JOINER, ALJ
HON. THOMAS G. POLITES, ALJ
AND
WORKERS COMPENSATION BOARD**

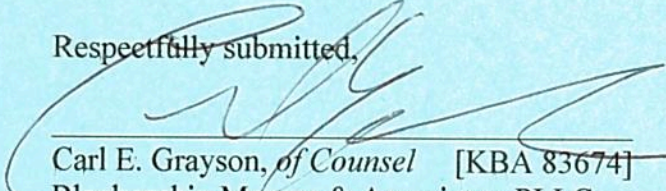
**APPELLEES/
CROSS-APPELLEES**

**COMBINED BRIEF ON BEHALF OF APPELLEE/CROSS-APPELLANT,
MAMIE BAYTOS, WIDOW OF STEPHEN BAYTOS, DECEASED**

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing to the following on this the 14th day of August, 2015, and the original and ten (10) copies were filed with the Clerk, Supreme Court of Kentucky, 700 Capitol Ave., Room 209, Capitol Bldg., Frankfort, KY, 40601; Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, the Workers' Compensation Board, Office of Workers Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY, 40601; Hon. Thomas G. Polites, ALJ, 2780 Research Park Drive, Spindletop Office Complex, Lexington, KY 40511; Hon. Richard M. Joiner, 145 East Center Street, Madisonville, KY. 42431; Hon. Melanie B. Gabbard, Esq., Allen, Kopet & Associates, PLLC, P.O. Box 34048, Lexington, KY 40588; Lewis G. Paisley, Esq., Stoll, Keenon, Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801; and Jeffrey A. Roberts, Esq., Roberts Law Office, 509 Main Street, Murray, KY 42071.

Respectfully submitted,


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INTRODUCTION

This is an appeal of a Workers' Compensation case in which Appellee/Cross-Appellant, Mamie Baytos, widow of Stephen Baytos, by and through counsel, responds to the appeal of Family Dollar to the Kentucky Supreme Court from the Opinion Vacating and Remanding, of the Kentucky Court of Appeals, dated March 20, 2015. The Court of Appeals reversed the Kentucky Workers' Compensation Board Opinion dated June 2, 2014, which had reversed the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ, and the Opinion & Order of Richard M. Joiner, Administrative Law Judge dated June 19, 2012. The Opinion Vacating and Remanding, consistent with the Administrative Law Judges, held that Mamie Baytos' claim for "widow's benefits" under KRS 342.750 was not extinguished by her husband's release of Family Dollar. Family Dollar appeals this decision, arguing: the Court of Appeals erroneously relied on precedent; that the legislature did not intend on widows receiving benefits when their spouses settle their claim; that Mamie Baytos' claim was derivative of her husband's claim and therefore barred by the release; and that the Kentucky Workers' Compensation Act favors prompt resolution of Claims.

Mamie Baytos also submits her cross-appeal to the Kentucky Supreme Court from the Opinion of the Kentucky Court of Appeals, dated March 20, 2015 and the Kentucky Workers' Compensation Board Opinion dated June 2, 2014, which denied Mamie Baytos' Motion to Dismiss Family Dollar's appeal on the grounds of a defective notice of appeal. Mamie Baytos' cross-appeal arises from the failure of the Family Dollar to appeal to the Workers' Compensation Board from the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ, the "final order" in this matter.

STATEMENT CONCERNING ORAL ARGUMENT

Mamie Baytos requests oral argument because it may help the Court to understand the Appellee/Cross-Appellant's position and provide clarification on the legal theories and the history of this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Stephen Baytos suffered a work related injury, in particular a torn thoracic aorta, on February 9, 2006. (Appendix 7, Opinion and Award of September 4, 2007). His award would have paid him \$134,861 had Family Dollar paid the periodic payments for the awarded time period of 425 weeks. He settled **his claim** for workers' compensation benefits in a lump sum by Form 110-I entered July 10, 2008. (Appendix 6). The Form 110-I makes it clear that Mr. Baytos received \$85,740.82 **for his remaining benefits, which represented the present value of his benefits after applying a 4.25% discount rate.** The settlement also included waivers by Stephen Baytos of his right to reopen. More importantly the additional release language states "[t]his settlement represents a compromised agreement of an adjudicated claim, wherein the Claimant, Stephen Baytos agrees to accept the total sum of \$100,000 in consideration for a complete discharge of any claim he may have now or in the future against the Employer" (Appendix 6, Form 110-I, Other Information, paragraph 1, July 10, 2008)(emphasis added). In fact, all of the paragraphs in the "Other Information" section specifically limit the releases therein to Stephen Baytos. (Appendix 6, Form 110-I, Other Information, paragraphs 1-6, July 10, 2008). **Any benefits that Mamie Baytos might be entitled to were not mentioned or made a part of the settlement agreement signed by Stephen Baytos and approved by the ALJ. In addition, Mamie Baytos was not a party to the settlement between her husband and Family Dollar, and did not sign the Form 110-I which is at issue.**

On December 3, 2009, less than four years later after his work related injury, Mr. Baytos died from the work related injury. Mr. Baytos died leaving his un-remarried widow, Mamie Baytos.

A motion to reopen for the purpose of Mamie Baytos obtaining Widows benefits was filed and sustained. Mamie Baytos was made a party hereto by order dated September 23, 2011. By Opinion & Order of Richard M. Joiner, Administrative Law Judge dated June 19, 2012, Judge Joiner held that Mamie Baytos' claim in which she had to prove that death was caused by the work injury was not "barred by the settlement. This claim is entirely the widow's and cannot be waived by the employee." (Appendix 3, Opinion & Order, p. 5). The Opinion & Order was adopted in the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ in which Mamie Baytos was awarded benefits under KRS 342.750. (Appendix 2). The benefits awarded to Mamie Baytos are \$350 per week, until she remarries or qualifies for social security benefits as Stephen Baytos' widow. Given her age, and if she does not remarry, her total award would calculate to \$152,950.

Family Dollar filed an appeal to the Workers' Compensation Board. Significantly, Family Dollar specifically stated it was appealing the order of ALJ Joiner instead of appealing from the final and appealable order of ALJ Polites. (Appendix 8). Appellee/Cross-Appellant filed Respondent, Mamie Baytos, Widow of Stephen Baytos' Motion to Dismiss Appeal of Defendant/Employer, Family Dollar, which was summarily denied by the Board without addressing the issue raised. (Appendices 4 and 9).

Subsequently, the Board, stating the matter before it raised an issue of first impression, reversed the decisions of Judge Joiner and Judge Polites, holding that "a worker's full and final settlement of a claim, the valid waiver of his right to reopen for a worsening condition, and the dismissal of his claim with prejudice effectively bars recovery for his subsequent death as a result of the work-related injury." (Appendix 1, Opinion Vacating and Remanding, pp. 5, 10)(emphasis added).

Mamie Baytos appealed to the Kentucky Court of Appeals which reversed the Workers' Compensation Board, holding that Mamie Baytos' claim was not barred by her husband's settlement and that the factual scenario was not one of first impression, but in fact had previously be unequivocally adjudicated in *Brashear v. Old Straight Creek Coal Corp.*, 236 Ky. 83, 32 S.W.2d 717 (Ky. 1930). The Court of Appeals also upheld the Workers' Compensation Board's denial of Mamie Baytos' Motion to Dismiss Appeal. This appeal by Family Dollar and cross-appeal by Mamie Baytos follow.

ARGUMENT

I. THE RESOLUTION OF STEPHEN BAYTOS' CLAIM FOR BENEFITS PRIOR TO HIS DEATH DID NOT PROHIBIT HIS WIDOW MAMIE BAYTOS FROM BRINGING HER OWN CLAIM FOR BENEFITS UNDER KRS 342.750

A. The Court of Appeals did not Erroneously rely on *Brashear v. Old Straight Creek Coal Corp*

Family Dollar argues the Court of Appeals erroneously relied on *Brashear v. Old Straight Creek Coal Corp.*, 236 Ky. 83, 32 S.W.2d 717 (Ky. 1930), in reversing the Workers' Compensation Board. The argument is that *Brashear* was decided in 1930 and KRS 342.750 was enacted in 1972. Family Dollar offers no analysis of why it would make any difference when KRS 342.750 was enacted and points to no relevant changes in the claimed benefits available. The reason is the changes enacted in KRS 342.750 made it easier for widows to obtain benefits, not more difficult. *Brusman v. Newport Steel Corp.* 17 S.W.3d 514 (Ky. 2000). In addressing the 1972 Enactment

the Supreme Court stated:

Three things are apparent from the language of KRS 342.750(1) and KRS 342.730(3):(1) With respect to widows, widowers and children, the statutory schemes are virtually identical, except that the benefits are greater if the employee's death was work-related; (2) whereas KRS 342.070 had required a widow, widower or child to be actually dependent in order to be entitled to death benefits, the present statutes contain no such requirement; and (3) whereas KRS 342.075(1)(b) presumes that a child is wholly dependent only up to age sixteen, a child is entitled to benefits under KRS 342.750 and KRS 342.730(3) up to age eighteen regardless of dependency. The requirement of dependency with respect to death benefits under 342.750 now applies only to parents, grandparents, grandchildren, siblings of the deceased, and children over eighteen who are not full-time students or who are incapable of self-support.

Id. at 517(emphasis added)

Likewise, the citation of *Brashear* in subsequent cases is irrelevant as to whether it is of precedential value. When *Brashear* was decided, the Court of Appeals was the highest Court in the Commonwealth; it is still of precedential value.

Simply stated, Family Dollar offers no rationale as to why *Brashear* should be ignored, and not applied to the facts at bar. Accordingly, such argument is without merit.

B. Legislative Intent and Statutory Construction do not Compel a Finding in Favor of Appellant

Family Dollar sets forth that the Court of appeals should have ignored precedent and engaged in statutory interpretation of KRS 342.750. It bases this on what it perceives as the Workers Compensation Board's in depth analysis. As support, it offers *Brusman* as "insight" and "guidance" as to statutory interpretation. It further sets out the

proposition, without support, that “courts have consistently construed the two death benefits statutes (KRS 342.730(3) and KRS 342.750) as establishing the payment of income benefits as deriving from the injured worker.” (Brief p. 9). This morphs into Family Dollar’s conclusion that allowing Mamie Baytos, a widow, to recover “widow benefits” would amount to a double recovery. For the following reasons, this argument fails.

With regard to *Brusman*, it involved the sole issue of whether a widow had to demonstrate actual dependency to collect widow’s benefits. *Brusman* made it clear that when the legislature includes a benefit for a survivor in a statute, such as KRS 342.750, the statute must be read to confer such benefit.

KRS 342.750 could not be more clear as to Mamie Baytos’ entitlement benefits. KRS 342.750 is titled “Income benefits for death – Additional lump sum payments for death occurring within four years of injury.” By virtue of its title, KRS 342.750 provides Mamie Baytos with statutory benefits, that are **additional, separate and distinct** from the claims Stephen Baytos released in the Form 110-I. Indeed, as that claim belongs to the widow, the injured worker would lack capacity to release it since parties to a marriage are legally separate persons, each free to contract without binding the other.

Mamie Baytos’ claim ripened because of the death of Stephen Baytos within the four year window. As KRS 342.750(1) dictates, if the injury causes death, the widow shall be entitled to 50 percent of the average weekly wage of the deceased if there are no children or 45 percent of the average weekly wage if there is a child or children living with the widow. KRS 342.750(1)(a) and (b). KRS 342.750 provides certain classes of people, such as widows, with **additional** benefits for deaths occurring within four years of

injury. Under the statute, the only requirement is that the injury cause death within four years. Mamie Baytos' husband died within four years of his injury and she has not remarried. Pursuant to KRS 342.750(1)(a), Mamie Baytos is entitled to death benefits equal to 50 percent of the average weekly wage of Stephen Baytos during widowhood.

Family Dollar's argument misses the purpose of the statute and ignores the rules of statutory interpretation which require that a statute be given its plain meaning and that the various sections must be read to give the statute its legislative meaning. The Kentucky Supreme Court has stated:

When construing a statute, this Court is presented with an issue of law which we address *de novo*. Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644, 647 (Ky.2007). "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." MPM Financial Group, Inc. v. Morton, 289 S.W.3d 193, 197 (Ky. 2009); Saxton v. Commonwealth, 315 S.W.3d 293, 300 (Ky. 2010) ("Discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction."). This fundamental principle is underscored by the General Assembly itself in the following oft-quoted language of KRS 446.080(1): "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature...." In Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011), we summarized the basic principles of statutory construction as follows:

In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.... We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.... We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.... Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts....(citations omitted).

Thus, we first look at the language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions.³ See, e.g., Caesars Riverboat Casino, LLC v. Beach, 336 S.W.3d 51, 58 (Ky. 2011) (employing dictionary to determine “common, ordinary meaning” of the verb “to arise” as used in long-arm service of process statute); Devasier v. James, 278 S.W.3d 625, 632 (Ky. 2009) (using dictionary to determine common, everyday meaning of “communicate” in statute requiring mental health professional to warn intended victim of actual threat); Malone v. Ky. Farm Bureau Mut. Ins. Co., 287 S.W.3d 656, 658 (Ky. 2009) (using dictionary to define “agree” as used in Motor Vehicle Reparations Act settlement statute); Commonwealth v. McCombs, 304 S.W.3d 676, 681 (Ky. 2009) (using dictionary to define “club” as used in statutory definition of a “deadly weapon”); Clark v. Commonwealth, 267 S.W.3d 668, 676–77 (Ky. 2008) (using dictionary to define “employ,” “authorize,” “induce” and “produce” as used in penal statutes addressing sexual performance by minor).

The particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent. Petitioner F. v. Brown, 306 S.W.3d 80, 85–86 (Ky. 2010) (Statutory enactment must be read as a whole and in context with other parts of statute with “any language in the act ... read in light of the whole act.”); Democratic Party of Ky. v. Graham, 976 S.W.2d 423, 429 (Ky. 1998) (Court cannot focus on “a single sentence or member of a sentence but [must] look to the provisions of the whole.”).

However, this preliminary assessment may not resolve the issue if the statute's wording is ambiguous. As cogently stated in MPM Financial Group, [w]hen the undefined words or terms in a statute give rise to two mutually exclusive, yet reasonable constructions, the statute is ambiguous. Young v. Hammond, 139 S.W.3d 895, 910 (Ky. 2004); See also Black's Law Dictionary 88 (8th ed. 2004), (defining ambiguity as: “An uncertainty of meaning or intention, as in a contractual term or statutory provision.”); Black's Law Dictionary 73 (5th ed. 1979) (a term is “ambiguous” when “it is reasonably capable of being understood in more than one sense”).

289 S.W.3d at 198. Where the statute is ambiguous, the Court may properly resort to legislative history. Id.; Fiscal Court of Jefferson Co. v. City of Louisville, 559 S.W.2d 478, 480 (Ky. 1977) (“The report of legislative committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may be looked at to determine the intent of the legislature.”). Often legislative history is referenced, even

where a statute is. unambiguous, simply to underscore the correctness of a particular construction. See *Stephenson v. Woodward*, 182 S.W.3d 162, 172 (Ky. 2005) (Resort to legislative history is unnecessary when the statute is “abundantly clear,” but in case at bar “legislative history is enlightening and serves only to strengthen our foregoing conclusion.”).

As noted, the Court may also apply time-honored canons of statutory construction. See, e.g., *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010) (applying the statutory construction tenet referred to as *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another)); *Economy Optical Co. v. Ky. Bd. of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958) (applying canon of “*in pari materia*” (“in the same matter”): statutes should be construed together, should be harmonized where possible and should result in effectiveness of all provisions, especially where two acts are passed at the same legislative session and become effective on the same day).

Jefferson County Board of Education v. Fell, 391 S.W.3d 713, 718 (Ky. 2012).

When applying these rules, the intent of the legislation must be given paramount deference. As succinctly stated by this Court:

When an employee is totally and permanently disabled, by a combination of injuries or of an injury and occupational disease, he ought to be compensated for life at the rate for total permanent disability (KRS 342.730(1)(a)), rather than for a limited duration and at the lesser rate for permanent partial disabilities (KRS 342.730(1)(b)). Each defendant should, in this instance, be liable for his share of the lifetime award. ***This principle of protecting the interests of the injured worker is a basic tenet of workers' compensation law.***

Beale v. Shepherd, 809 S.W.2d 845, 849 (Ky. 1991)(emphasis added).

Considering the foregoing, KRS 342.750 can only be interpreted as intending to provide income to the spouse of a deceased who dies from work related injuries, so he or she is not destitute. Moreover, since the death has to occur within four years of the work related injury, the benefits a widow or widower may receive could far exceed the benefits the decedent received during their lifetime. As such, it is clear that the legislature intended for the surviving spouse to collect his or her benefits independent of and in

addition to the decedent's benefits. Simply stated, the first recovery was had by Stephen Baytos for his injury and the second recovery is by his surviving spouse, as a result of his death for which no compensation was previously paid.

Family Dollar's argument that there would be a duplication of benefits does not address the benefits to which Ms. Baytos would have been entitled without a release. In fact, in accordance with the statute, if Mr. Baytos had not settled Ms. Baytos would be entitled to half of his average weekly wage, **which potentially could be for her entire widowhood.**¹ This amount could exceed what Mr. Baytos could have possibly received prior to his death.² This is exactly what the statute intended. Conversely, to read the statute as suggested by Family Dollar, would allow an employer to settle with a severely injured worker **for his benefits** and have that worker sign a release without their spouse's knowledge or agreement, stripping the surviving spouse of statutorily vested benefits, without compensation. Since the death has to occur within 4 years of the injury and ordinary injury benefits run for 425 weeks (8 + years), in almost all instances the amount the worker settled for would be far less than what the surviving spouse (and potentially dependent children) would be entitled. This would totally eviscerate the entire purpose and language of KRS 342.750. Further, such an interpretation would be contrary to established law regarding spousal rights and would violate a surviving spouse's due process rights as he or she would have no chance to present or adjudicate her statutory rights.

1 Had Family Dollar simply paid the award and not voluntarily paid a lump sum to buy out Mr. Baytos' benefits, it would have no argument that the claim of Ms. Baytos was owed.

2 Mr. Baytos periodic award totaled \$134,861. Ms. Baytos' widow's benefits, should she receive them for the maximum duration, could be as high as \$152,950.

Lastly, even if there was a “duplication” of benefits, Family Dollar could have asked for an offset of benefits that may have been duplicated. The fact it has not strongly suggests that is because it is aware the benefits due Mamie Baytos are separate and distinct from those paid to Stephen Baytos.

**C. Mamie Baytos’ Entitlement to Benefits Under KRS 342.750 is not
Derivative of the Claims of her Deceased Husband, Stephen Baytos**

- i. Mamie Baytos’ claim was not derivative of Stephen Baytos’ claim, but such claim ripened and vested with Mamie Baytos upon the death of Mr. Baytos.**

Family Dollar also argues Mamie Baytos’ claim was derivative of Stephen Baytos’ claim and was therefore extinguished by Mr. Baytos. Family Dollar’s argument ignores both *Taylor v. Cornett Lewis Coal Co.*, 281 Ky. 366, 136 S.W.2d 21, 23 (Ky. 1940) and *Brashear*. In *Taylor*, the Court held that “. . . [an] administrator has no claim by virtue of the Compensation Act, **such a claim being vested only in the dependents of a deceased workman.**” *Id.* at 369 (emphasis added). *Taylor* stands for the proposition that an administrator, who acts on behalf of the deceased employee, cannot release the claims of anyone other than the decedent.

In *Brashear*, the widow of a man which had been paid compensation for his injury made a claim for widow and dependent benefits. *Brashear* at 84. The Court held that the compensation due her in the form of widow and dependent benefits was “quite a different thing from the compensation paid to her husband.” *Id.* at 85. It further stated that even if the husband had made “a final settlement, that would not prevent an award to the widow, if, in truth and fact, the death was brought about as a direct result of his injuries so received.”

Id. Further, *Brashear* is consistent with the rules of statutory construction and the intent of the Workers' Compensation Act in *protecting the interests of the injured worker*.

Jefferson County Board of Education v. Fell; Beale v. Shepherd (emphasis added).

Mamie Baytos was entitled to benefits under KRS 342.750, if she could satisfy the statutory requirements as set forth above. As such, it is clear the benefits are not derivative of Stephen Baytos, but instead the statutory requirements to collecting such benefits rights were satisfied the moment Stephen Baytos died. Moreover, Mamie Baytos had no claim under KRS 342.750, until Stephen Baytos died and until then could neither re-open the claim nor obtain benefits prior to that time. The death merely provided the last statutory requirement which allowed her to recover.

Lastly, a surviving spouse's claim is only derivative in the sense that it arose because of their spouse's work related injury. However, the claim for benefits, once that injury/death occurs, is vested in the spouse and not dependent on the decedents' benefits received during his or her lifetime or any release of his benefits he may have signed.

ii. Derivative or not, Mamie Baytos' claim was neither released nor releasable by Stephen Baytos

As clearly set forth in the Form 110-I, Stephen Baytos released his claims, and those of no one else. Moreover, even the claims he released for his heirs are only those claims that would, naturally, flow through him. There is no release for the claim of Mamie Baytos, his widow.

It is further clear that Stephen Baytos cannot release the rights of another. As just one example, Appellee/Cross-Appellant offers the current law on loss of consortium

claims. A loss of spousal consortium is a derivative statutory right vested in one spouse upon injury to the other spouse. KRS 411.145. This is analogous to the widow benefits which were statutorily vested in Mamie Baytos and ripened upon the death of Stephen Baytos. Like Mamie Baytos' claim, loss of consortium is a statutory claim, derivative of the claim of the injured spouse. Moreover, even though the underlying claim for injury may be settled and a release entered between the tortfeasor and the injured party, or in this case between the employer and the employee, it does NOT release the independent claim of the spouse claiming loss of consortium, or the claim of the widow for widow's benefits. *Transit Authority of River City [TARC] v. Vinson*, 703 S.W.2d 482 (Ky. 1985) (quoting *Kotsiris v. Ling*, 451 S.W. 2d 411 (Ky. 1970)).

The only Workers' Compensation case found on point regarding the binding effect of a release on behalf of a decedent as not releasing the claims of others is found in *Taylor v. Cornett Lewis Coal Co.* In *Taylor*, the Court held that "[T]he fact that an agreement of settlement, signed by the administrator, was filed with the Board is no evidence whatsoever that a settlement between the parties had been made under the Compensation [sic] Act because [sic] the administrator has no claim by virtue of the Compensation Act, such a claim being vested only in the dependents of a deceased workman." *Id.* at 369. *Taylor* stands for the proposition that an administrator, who acts on behalf of the deceased employee, cannot release the claims of anyone other than the decedent. *Taylor* makes it clear that Mamie Baytos, like the decedent's dependents in *Taylor*, was vested with her own statutory rights which were not and could not have been released by Stephen Baytos. Since Stephen Baytos had no authority to act for Mamie Baytos, he could not release her claims or right to reopen.

Likewise, the law is clear that claims brought on behalf of a decedent are to be brought by his personal representative. However, such claims do not extinguish the survivor's independent statutory claims. *Daley v. Reed*, 87 S.W.3d 247, 249 (Ky. 2002).

Appellant tries to diminish *Taylor* by arguing that it stands for whether a spouse can bring a claim on behalf of her deceased spouse. The case simply does not contain any such holding. The holding makes it clear that an administrator, who acts on behalf of the deceased employee, cannot release the claims of anyone other than the decedent.

Likewise, Appellant offers *Tackett v. Bethenergy*, 841 S.W.2d 177 (Ky. 1992) for the proposition that a deceased workers estate's claim derives from a valid claim by the worker. Simply stated, this case is not a claim by an estate, but a claim by Mamie Baytos in her own right as a widow.

Stephen Baytos was covered under the Act and successfully pursued a claim. Stephen never waived his coverage under the Act, he only waived his benefits. He did not and could not waive the benefits or rights of Mamie Baytos.

D. The Kentucky Workers' Compensation Act Policy of Favoring of Prompt Resolution of Claims is Irrelevant to the Issue Before the Court and does not mean Promptness can be used to Deprive a Claimant of Benefits

Family Dollar argues that upholding the Court of Appeals will impair a party from settling a workers' compensation claim on the basis of complete resolution. Family Dollar does not define "complete resolution" but it appears to mean it can close its file.

As a matter of first impression, there is nothing in the Workers' Compensation Act ("Act") that compels either an employer or employee to settle for a lump sum. In fact, periodic payments are all that is required. If Family Dollar had simply paid the periodic

payments, and not chosen to settle Mr. Baytos' periodic benefits for a lump sum, this case would not be before this Court.

It is clear in Family Dollar's argument that it wants "complete resolution" by paying a lump sum to buy out **the employee's** periodic benefits. The true intent of such a "complete resolution" is that the Family Dollar wants the settlement of the employee's benefits to also extinguish the survivor's benefits, without paying to buy out those benefits. In other words it wants to extinguish the survivors claim through the injured employee, without compensating the survivor. Certainly, the Act did not envision such an inequitable result.

Family Dollar also states: "[t]he nature of the Workers' Compensation Act is to effectuate prompt resolution and payment of claims, with an urging toward settlement to reduce the cost and time involved in litigation." (Appellant's Brief p. 14, citing *Newberg v. Weaver*, 866 S.W.2d 435, 438 (Ky. 1993)). The Court in *Newberg* also stated:

[i]t is well established that the Workers' Compensation Act is social legislation which encompasses a number of public policy considerations. ***Foremost of these is the policy of compensating disabled workers for the decrease in their wage earning capacity which resulted from an injury caused by work.*** . . . Under the Act, a worker who sustains a permanent, occupational disability is awarded a benefit which is paid periodically in order to provide a continuing source of income in an amount sufficient to enable the worker ***and his dependents*** to meet their ongoing and essential requirements for food, clothing and shelter.

Newberg at 436, (emphasis added).

Similarly Family Dollar omitted mention of the intent of the Act which is to *protect the interests of the injured worker*. *Beale v. Shepherd* (emphasis added). Prompt settlement clearly refers to resolving claims in accordance with the intent of the Act. This

means, as the Act only requires periodic payments, the settling for the appropriate impairment percentage and making periodic payments, without protracted administrative processes. Regardless, the litigation in this case was created by Family Dollar when it failed to get Mamie Baytos to settle her claims. Perhaps the reason is that it did not want to pay for them. It was Family Dollar's choice to settle with Stephen Baytos for a lump sum. Family Dollar drafted the release and per the Form 101, Family Dollar knew Mamie Baytos existed.

KRS 342.750 has a built in four year limitation period. Any concern regarding the finality and continued litigation is amply refuted by the statutory language. Moreover, Appellant had every opportunity to obtain a signature and release from Mamie Baytos, as is frequently done in cases involving loss of consortium. In this case, had Family Dollar possessed the foresight to negotiate a release of widow's benefits and have Mamie Baytos sign it, the issue at bar would have been avoided. In effect, Family Dollar created the very problem of which it complains and now wants the Court to provide it relief.

The issue of finality was addressed in *Kelvin Corporation v. Ruben Vega*, 2002-SC-0594-WC (2003)(unpublished, copy attached hereto as Appendix 12). In *Vega*, the issue was whether payment of a lump sum after settlement with no increased impairment rating extinguished the employee's right to reopen. *Id.* No waivers were incorporated into the settlement. In holding it did not, the Kentucky Supreme Court stated:

“[u]nlike the ALJ and the dissent at the Court of Appeals, we are not convinced that this decision defeats an employer's purpose in entering into a settlement. It simply emphasizes the contractual nature of such an agreement and that risk that each party to an agreement bears. The fact remains that nothing prevented this employer from contracting for a waiver

of the claimants right to reopen . . . Having failed to do so, it has no basis to complain.”

Id at 7.

Likewise the argument that determining dependents would be an issue, is a red herring. (Brief p. 14). Dependents are determined as of the date of injury. KRS 342.750(5). Moreover, the Form 101, Application for Resolution of Injury Claim, No. 11, requires the dependents be listed. This case is no different than a case involving wrongful death and/or loss of consortium, in that while the claim may be based on an injury to another, it is vested as soon as the person is injured, and comes to ripeness upon the death of the employee for which his survivors can make claim.

II. THE COURT OF APPEALS ERRED IN DENYING RESPONDENT, MAMIE BAYTOS, WIDOW OF STEPHEN BAYTOS’ MOTION TO DISMISS APPEAL OF DEFENDANT/EMPLOYER, FAMILY DOLLAR

On August 3, 2012, Appellant, Family Dollar, appealed to the Workers’ Compensation Board (“Board”) from the Opinion & Order of Richard M. Joiner, Administrative Law Judge dated June 19, 2012, while it was still interlocutory. Mamie Baytos filed a Motion to Dismiss Appeal or in the Alternative to Hold in Abeyance and Remand to the Administrative Law Judge for Findings on Causation on the grounds the appeal was premature as the Opinion & Award was interlocutory since it did not finally resolve all issues. (CR 54.01, 54.02). The Board granted the Motion and dismissed the appeal as interlocutory on August 31, 2012. (Appendix 5). The Board did not hold the appeal in abeyance. Subsequently, the February 3, 2014 Order and Opinion of Hon.

Thomas Polites, ALJ, was entered making this matter final. On February 19, 2014, Family Dollar filed its Notice of Appeal from the Opinion & Order of Richard M. Joiner, Administrative Law Judge dated June 19, 2012. (Appendix 8). The Notice of Appeal did not identify the February 3, 2014 Order and Opinion of Hon. Thomas Polites as the order from which Family Dollar was appealing. Instead it states that “Petitioner requests a review by the Workers’ Compensation Board of the opinion and award rendered herein by Honorable Richard Joiner, Administrative Law Judge, on June 19, 2012. (Appendix 8, p. 1). Family Dollar did not ask for a review of the final order issued, the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ.

Mamie Baytos moved the Board to dismiss the appeal of Family Dollar. (Appendix 9). In her Motion, Ms. Baytos argued that 803 KAR 25:010, Section 21 provides for review of Administrative Law Judge Decisions. This section states that . . . [p]ursuant to KRS 342.285(1), decisions of administrative law judges shall be subject to review by the Workers’ Compensation Board in accordance with the procedures set out in this administrative regulation. Section 21(2)(a) states that [w]ithin thirty (30) days of the date **a final award, order, or decision** rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers’ Compensation Board. [Emphasis added]. Section 21(2)(b) states that [a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).

Pursuant to CR 54.02(2) the Opinion & Order of Richard M. Joiner, Administrative Law Judge dated June 19, 2012, was re-adjudicated by the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ, which also incorporated Judge

Joiner's Opinion & Award dated June 19, 2012. (Appendix 2, Opinion and Order of Judge Polites, p. 3, 4, 5). As such, the June 19, 2012, Opinion & Award of Judge Joiner was both re-adjudicated and superseded by Judge Polites Opinion and Order of February 3, 2014, and the proper "final order" to appeal from is that of Judge Polites. The Board did not agree and by Order dated March 26, 2014, the Motion was summarily denied. The Court of Appeals held that the mention of Judge Polites Order was sufficient to invoke jurisdiction and upheld the Board's decision. It is submitted that the Notice only referenced Judge Polites' Order in the sense that it made Judge Joiner's Order final and thus ripe for appeal, not as an order from which the appeal was being taken.

Judge Joiner's Opinion & Award is and was not a "final order" as required and contemplated by 803 KAR 25:010, Section 21 and CR 54.01 and 54.02 and as was held by the Board in deciding to dismiss the first appeal. Accordingly, since Appellant did not appeal to the Board from the final order, the Court of Appeals erred in not reversing the Board on the issue of whether Family Dollar's Notice of Appeal was defective.

CONCLUSION

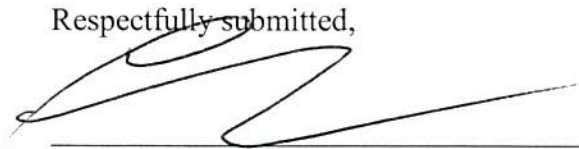
The Court of Appeals properly reversed the Opinion Vacating and Remanding of the Workers' Compensation Board. While Mamie Baytos' claim may be derivative in that it arose due to an injury to Stephen Baytos, it was her rights that vested upon injury to Stephen Baytos and ripened when her husband died. Her husband did not have the right to release her claim, and did not release her claim.

Further, the Court of Appeals erred in not reversing the Order denying the Mamie Baytos, Widow of Stephen Baytos' Motion to Dismiss Appeal of Family Dollar, because

it is clear from the face of the Notice of Appeal there was no appeal taken from the February 3, 2014 Order and Opinion of Hon. Thomas Polites, ALJ, which was the final order.

Accordingly, Mamie Baytos respectfully requests that this Court uphold the Opinion Vacating and Remanding of the Court of Appeals on the issue of Mamie Baytos' entitlement to benefits under KRS 342.750 or alternatively reverse the Court of Appeals on the issue of whether Family Dollar filed a defective notice of appeal.

Respectfully submitted,



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